Supreme Court, U.S.
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No. 00-501

IN THE

Supreme Court of the United States

EDWARD E. LITWAK,

Petitioner,

v.

OSCAR PRODUCTIONS, INC., (f/s/o Jennifer O'Neill) and JENNIFER O'NEILL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent Oscar Productions, Inc. is a privately held corporation, and no parent or publicly held company owns ten percent or more of the corporation's stock.

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SUMMARY OF ARGUMENT

In *Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654 (1991) and *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 105 S. Ct. 1327 (1985), this Court established the framework for analyzing the issue presented on this Petition — that is, whether state default judgments must be given collateral estoppel effect in accordance with the Full Faith and Credit statute in bankruptcy nondischargeability proceedings. Each of the circuits that has applied this framework has arrived at the same conclusion: there is no justification for departing from the Full Faith and Credit statute in the context of default judgments, particularly in light of this Court's express holding in *Grogan* that collateral estoppel principles apply in nondischargeability proceedings. Moreover, requiring bankruptcy courts to apply state principles of collateral estoppel is in no way unique and does not offend Congress' power to establish uniform laws on the subject of bankruptcy. Accordingly, Litwak's Petition for Writ of Certiorari raises no issue requiring resolution by this Court, and it should be denied.

STATEMENT OF THE CASE

A. Factual Background

Respondent Jennifer O'Neill is a world-renowned professional actress and spokesperson. For nearly three decades prior to 1991, she was a spokesperson for Proctor & Gamble's "Cover Girl" line of cosmetics. Ms. O'Neill starred in more than thirty feature films, including "Summer of '42," as well as numerous television movies and three television series. Oscar Productions, Inc. is Ms. O'Neill's personal services corporation.

When Ms. O'Neill's unprecedented relationship with "Cover Girl" came to an end in 1991, she began to investigate other endorsement opportunities. In August of 1991, Ms. O'Neill was approached with the possibility of representing and endorsing Paolo Gucci products. Subsequently, she met petitioner Edward Litwak. Litwak represented that he was Paolo Gucci's current licensing agent and had served in that capacity for the previous ten years. Litwak further represented that he was specifically authorized by Gucci to negotiate and finalize an endorsement agreement.

On October 23, 1991, Oscar Productions (for the services of Jennifer O'Neill) and Paolo Gucci, M.J. Knoud, Inc., Paolo Gucci Licenses and Paolo Gucci Designs entered into a spokesperson and endorsement agreement ("the Agreement"). Litwak executed the Agreement "as Licensing Agent for Paolo Gucci, M.J. Knoud, Inc., Paolo Gucci Licenses and as Chief Executive Officer of Paolo Gucci Designs." Pursuant to the Agreement, Ms. O'Neill committed to endorse certain of Gucci's services and products for a term of five (5) years in consideration of the payment of $6,250,000. In light of the negotiations and eventual Agreement, Ms. O'Neill did not pursue any other endorsement opportunities, although she was at the time in an excellent position to do so, given her then-recent and long-standing relationship with "Cover Girl."

Under the terms of the Agreement, the first payment of $250,000 was to be made on November 1, 1991. However, that payment was never made. Litwak repeatedly assured the respondents that the Agreement would be honored and that he would personally put up the money for the first $250,000 payment if necessary. None of these promises were fulfilled. The respondents continued to attempt to work with Litwak for approximately another month, to no avail.

Finally, on January 23, 1992, Litwak sent Ms. O'Neill a letter in which he denied that he ever had any authority to act on behalf of Gucci. He further admitted in that letter that his "actions in signing [the Agreement] in this matter was [sic] totally improper and wrongful."

B. Procedural Background

On August 14, 1992, Oscar Productions, Inc. and Jennifer O'Neill brought an action in the Los Angeles County Superior Court against Edward E. Litwak for Conspiracy, Fraudulent Inducement to Contract, Negligent Misrepresentation, Bad Faith Denial of Contract, Bad Faith Denial of Agency, Breach of Contract, and Intentional Infliction of Emotional Distress. On October 21, 1992, the respondents filed a substantially identical First Amended Complaint.

Litwak failed to answer the First Amended Complaint, and the state court entered a default against him on January 11, 1993. In accordance with California law, a copy of the Request for Entry of Default was served on Litwak at his last known address. Moreover, Litwak appeared for deposition in the state court action on February 17 and 18, 1993 pursuant to subpoena, and he admits that he knew at that time that his default had been entered. Nonetheless, Litwak never made *any effort* to have his default set aside.

In accordance with California law, the respondents subsequently requested the entry of a default judgment on the fraud and intentional infliction of emotional distress claims alone, submitting their evidence on March 10, 1997. On March 17, 1997, the Superior Court entered a judgment against Litwak on the fraud and intentional infliction of

emotional distress claims in the amount of $6,250,000, plus $2,230,559.40 in prejudgment interest, and costs of $182, together with interest as provided by law. No appeal was taken from the judgment, which became final on September 13, 1997, pursuant to California Rule of Court 2(a).

On November 5, 1997, after the respondents began execution proceedings, Litwak filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code, seeking to discharge the debt. The respondents commenced an adversary proceeding on January 8, 1998, to determine the non-dischargeability of the debt arising out of their state court judgment, pursuant to 11 U.S.C. §§ 523(a)(2)(A) (fraud) and 523(a)(6) (willful and malicious injury).

The respondents then filed a motion for summary judgment in the adversary proceeding based upon the California state court default judgment for fraud and intentional infliction of emotional distress. On May 26, 1998, the Bankruptcy Court granted the respondents' Motion for Summary Judgment, determining that it was required to give collateral estoppel effect to the respondents' state court judgment. The Bankruptcy Court subsequently entered its Order and Findings of Fact and Conclusions of Law on June 11, 1998.

Litwak then filed an appeal to the Bankruptcy Appellate Panel, claiming that the Bankruptcy Court erred in applying collateral estoppel. The Bankruptcy Appellate Panel affirmed the Bankruptcy Court's Order on March 2, 1999. Litwak next appealed to the Ninth Circuit Court of Appeals, which also affirmed the lower courts' rulings on May 2, 2000, citing this Court's decision in *Grogan*, *supra*, and *Maresse*, *supra*. Having failed to convince the Ninth Circuit to rehear the

case *en banc*, Litwak now seeks relief from this Court. However, Litwak has not raised any issue justifying review by this Court, and his Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Among The Circuits That Have Applied The Analytical Framework Established By This Court.

A. The Analytical Framework.

This Court conclusively established that the doctrine of collateral estoppel applies in bankruptcy dischargeability proceedings in *Grogan v. Garner*, 498 U.S. 279, 284-285 & n.11, 111 S. Ct. 654, 658 (1991). Citing its prior decisions, including *Brown v. Felson*, 442 U.S. 127, 139, 99 S. Ct. 2205, 2213 (1979), this Court stated, "we now clarify that collateral estoppel principles do indeed apply in discharge exception proceedings pursuant to § 523(a)." *Id.*

Moreover, as explained in *Grogan*, while "the issue of nondischargeability has been a matter of federal law governed by the terms of the Bankruptcy Code," "the validity of a creditor's claim is determined by rules of state law." *Id.* at 283-84. In other words, while the nature of claims that may be discharged is governed exclusively by 11 U.S.C. § 523, and only bankruptcy courts may determine which such claims are dischargeable, determinations as to the substance of those claims spring from state law.[1]

1. In this case, respondents obtained a judgment against Litwak for fraud and intentional infliction of emotional distress. Litwak (Cont'd)

This Court has also made clear that, in determining the effect of a state court judgment in a subsequent federal proceeding, federal courts must look to the law of the state in which the judgment was rendered in accordance with the Full Faith and Credit statute, 28 U.S.C. § 1738. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S. Ct. 1327 (1985). The Full Faith and Credit statute was enacted by the very first Congress, and requires that federal courts accord state judgments the same effect "as they have by law or usage in the courts of the state from whence the said records are or shall be taken." Thus, under *Grogan* and *Marrese*, collateral estoppel effect must be given to state default judgments in bankruptcy nondischargeability proceedings to the same extent such effect would be given by the state rendering the judgment, unless this Court finds that the Full Faith and Credit statue should be ignored.

Marrese dealt with the application of collateral estoppel to a federal suit for antitrust violations based on a previous state court judgment. Because antitrust matters are within the exclusive jurisdiction of federal courts, the plaintiffs claimed that an exception to the Full Faith and Credit statute applied to allow them to bring the subsequent federal action. This Court ruled that, in order to determine whether an exception to the Full Faith and Credit statute should apply, federal courts must follow a two-step process. *Marrese*, 470 U.S. at 381. First, a federal court must look to state law to

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(Cont'd)

does not dispute that the elements necessary to prove these claims under California law sufficed to support the finding that Litwak's debt was (1) obtained by "false pretenses, false representation, or actual fraud," and (2) "for willful and malicious injury by the debtor," and therefore nondischargeable under 11 U.S.C. §§ 523(a)(2)(A) and (a)(6).

determine the preclusive effect of the state court judgment. If state law would not bar re-litigation of an issue or claim decided in the earlier proceeding, then the inquiry ends. If state law would afford the judgment preclusive effect, however, the court must then determine whether Congress created an express or implied repeal of § 1738. Since it was unclear whether the state preclusion law at issue in *Marrese* would bar antitrust litigation in the subsequent federal proceeding, the Court declined to address whether an exception to § 1738 applied, instead remanding the matter. *Id.* at 383. The Court stated, however, that "the fact that petitioners' antitrust claim is within the exclusive jurisdiction of the federal courts does not necessarily make § 1738 inapplicable to this case." *Id.* at 380.

The Court did have occasion to apply the *Marrese* test in *Matsushita Elec. Indust. Co. v. Epstein*, 516 U.S. 367, 380-81, 116 S. Ct. 873 (1996). *Matsushita* involved shareholders who were parties to both a Delaware class action suit, which resulted in a settlement judgment, and a federal securities lawsuit in the Central District of California. The defendants in the federal suit asserted that further claims against them were barred by the Delaware judgment. The Ninth Circuit rejected this defense, holding that the state court judgment could not bar securities claims which were in the exclusive jurisdiction of the federal courts. This Court reversed.

The Court first found that, under Delaware law, the Delaware judgment had preclusive effect. The Court next found that the federal securities laws contained no express repeal of § 1738. Finally — and most importantly for purposes of Litwak's petition — the Court found that, notwithstanding the exclusive grant of federal jurisdiction

for claims under the Securities Exchange Act, the situation did not create an implied repeal of § 1738. The Court noted that such repeals are extremely rare: "as a historical matter, we have seldom, if ever, held that a federal statute impliedly repealed § 1738 . . . due to the relatively stringent standard . . . that there be an 'irreconcilable conflict' between the two federal statutes at issue." *Id.* at 380-81, citing *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S. Ct. 1883 (1982).

When *Marrese* and *Matsushita* are read together with *Grogan*, it becomes clear that nothing in the Bankruptcy Code either expressly or impliedly repeals § 1738 with respect to collateral estoppel determinations. Indeed, *Grogan* specifically requires that collateral estoppel effect be given to state court judgments in nondischargeability proceedings.[2] Thus, a default judgment must be given the same effect as it would receive under the law of the state in which it was rendered. Because this Court has already established the analytical framework requiring this result, there is no need to grant Litwak's petition.

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2. Litwak makes much of the *Grogan* court's citation to the Restatement (Second) of Judgments § 27, which it referenced for the proposition that, in order for a judgment to have collateral estoppel effect on subsequent claim, (1) the elements of the two claims must be identical, and (2) those elements must have been "actually litigated" and determined in the first action. Because the Restatement elsewhere adopts the federal interpretation of the term "actually litigated" as not applying to default judgments, Litwak argues that *Grogan* requires application of the federal rule. However, Litwak reads entirely too much into this citation to the Restatement. All states incorporate the requirements noted by *Grogan* into their definition of collateral estoppel; the distinction between states arises from varying interpretations of the term "actually litigated," an issue not before the *Grogan* court.

B. Uniform Application of the Analytical Framework by the Circuits.

All of the Circuits that have analyzed this issue under the framework established by this Court as it relates to default judgments have come to the conclusion that the Full Faith and Credit statute applies. Of most relevance to the decision below was the Ninth Circuit's decision in *In re Nourbakhsh*, 67 F.3d 798 (9th Cir. 1995). In *Nourbakhsh*, the plaintiffs filed an action against the defendant in Florida state court, alleging fraud and other claims. The defendant did not file an answer, and the Florida court entered a default judgment against him, including a specific finding of fraud. The defendant subsequently filed a petition for bankruptcy in the Southern District of California. The plaintiffs filed an adversary complaint to determine nondischargeability of their debt based upon the default judgment. Upon motion for summary judgment, the Bankruptcy Court held that the debt was nondischargeable, and the Bankruptcy Appellate Panel affirmed.

Explicitly following the framework of *Marrese*, the Ninth Circuit first determined that Florida gives collateral estoppel effect to default judgments. The court then noted that the "full faith and credit requirement of § 1738 compels a bankruptcy court in a § 523(a)(2)(A) nondischargeability proceeding to give collateral estoppel effect to a prior state court judgment." 67 F.3d at 801. Citing *Grogan*, the Ninth Circuit then expressly determined that *no exception to § 1738 existed*, and therefore afforded collateral estoppel effect to the Florida default judgment. *Id.*

The Sixth Circuit reached precisely the same conclusion in *In re Calvert*, 105 F.3d 315 (6th Cir. 1997). The facts in *Calvert* were the converse of *Nourbakhsh*, and very similar to the situation below. In *Calvert*, the plaintiff obtained a California state court default judgment for fraud against the defendant, then filed a motion for summary judgment in an adversary proceeding when the defendant later filed for bankruptcy in the Western District of Tennessee. The bankruptcy court denied the motion for summary judgment, finding that the prior default judgment had not been "actually litigated" and that no evidence had been introduced into the record in the California case.[3] *Id.* at 316. The District Court affirmed the decision, but certified the case to the Sixth Circuit for interlocutory appeal. After engaging in an extensive analysis of *Marrese*, *Grogan* and the policies behind bankruptcy, the Sixth Circuit reversed the decision of the bankruptcy court, stating "we conclude that collateral estoppel applies to true default judgments in bankruptcy dischargeability proceedings in those states which would give such judgments that effect." *Id.* at 322.

Finally, the Fifth Circuit has also squarely addressed the issue, and has likewise determined that collateral estoppel effect must be given to default judgments in accordance with the law of the rendering state. *In re Caton*, 157 F.3d 1026 (5th Cir. 1998), *cert. denied*, 526 U.S. 1068, 119 S. Ct. 1462 (1999). Citing *Grogan*, the *Caton* court concluded that, under Illinois law, an Illinois default judgment receives full collateral estoppel effect, and therefore affirmed a finding

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3. The present case provides an even stronger one for application of collateral estoppel since substantial evidence was presented to the state court before it entered the default judgment. (Supplemental Excerpts of Record, Ex. 20, pp. 0309-0436, below).

that the plaintiff's default judgment for libel per se was nondischargeable.[4]

In an attempt to manufacture a conflict among the Circuits for purposes of this petition, Litwak asserts that the Third, Fourth and Seventh Circuits have found that the federal rule of collateral estoppel universally applies in nondischargeability proceedings. In order to reach this result, those Circuits would have been required to find that Congress impliedly repealed § 1738 under the tests set forth in *Marrese* and *Matsushita*. Close examination of the cases cited by Litwak, however, reveals no such findings.

Litwak begins by asserting that the Fourth Circuit held that default judgments cannot be given collateral estoppel effect in *In re Raynor*, 922 F.2d 1146 (4th Cir. 1991), which involved a North Carolina default judgment. However, the *Raynor* court cited neither *Grogan* — which would be decided a few days later — nor *Marrese*, and did not discuss North Carolina law at all.

In fact, subsequent Fourth Circuit cases have followed the *Grogan/Marrese* analysis, and have not found that § 1738 has been impliedly repealed. Indeed, in *In re Ansari*, 113 F.3d 17 (4th Cir. 1997), the Court of Appeals gave collateral estoppel effect to a Virginia default judgment in nondischargeability proceedings after analyzing Virginia law, which had rejected the rule of collateral estoppel

4. While conceding that the Fifth Circuit is in accord with the Sixth and Ninth Circuits, Litwak failed to cite *Caton* — a case which this Court decided not to hear — and instead cited the earlier case of *In re Garner*, 56 F.3d 677 (5th Cir. 1995). The Fifth Circuit reached the same conclusion regarding the application of *Marrese* in *In re Garner* as it did in *Caton*.

advocated by the Restatement (Second) of Judgments.[5] Even more recently, in *In re Genesys Data Technologies, Inc.*, 204 F.3d 124 (2000), the Fourth Circuit applied *Marrese* and *Grogan* to find that a Hawaii default judgment must be given collateral estoppel effect in bankruptcy claims allowance proceedings.

Nor has the Seventh Circuit held that § 1738 has been repealed with respect to state default judgments. As Litwak admits, the case he cites for this proposition, *Meyer v. Rigdon*, 36 F.3d 1375 (7th Cir. 1994), involved a default judgment entered by a federal district court. That case did not address the effect of the Full Faith and Credit statute at all.

Finally, Litwak cites *Matter of McMillan*, 579 F.2d 289 (3rd Cir. 1978), for the proposition that default judgments have no collateral estoppel effect in bankruptcy proceedings. The *McMillan* court refused to give collateral estoppel to a New Jersey default judgment for fraud. However, the *McMillan* case was decided prior to both *Grogan* and *Marrese*, and did not discuss § 1738 or even consider whether New Jersey default judgments are given collateral estoppel effect under the law of that state, instead simply applying the federal rule of collateral estoppel.[6] Moreover, no subsequent Third Circuit case has

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5. The *Ansari* court retrospectively noted that the decision in *Raynor* was correct because, unlike Virginia, North Carolina follows the Restatement rule, and does not accord collateral estoppel effect to default judgments. 113 F.3d at 22. Thus, *Raynor* can no longer be relied upon for the proposition that default judgments can never be given collateral estoppel effect in nondischargeability proceedings.

6. In a concurring opinion, Judge Gibbons did apply § 1738, noting that default judgments in fact are not given collateral estoppel (Cont'd)

explored the issue in the context of nondischargeability proceedings. Thus, contrary to Litwak's assertions, no actual conflict exists among the Circuits.

Notwithstanding the consistent application by the Circuits of *Marrese* and *Grogan*, Litwak nonetheless argues that this Court's earlier decision in *Brown v. Felson*, *supra*, supports the finding of an implied repeal of § 1738.[7] However, as recognized in *Nourbahksh*, *Calvert*, and *Brown* itself, the holding in *Brown* was expressly limited to the doctrine of *res judicata*, and does not govern in the context of collateral estoppel.

In *Brown*, a lender brought a collection suit against a car dealer and the loan guarantor in Colorado state court.

(Cont'd)
effect under New Jersey law. Judge Gibbons then went on to opine that, even if New Jersey law were to the contrary, he would find an exception to § 1738. However, as *Marrese* would later teach, this conclusion was unnecessary to Judge Gibbons' analysis given New Jersey law, and in any event was of course not part of the holding in the *McMillan* case.

7. Litwak's argument that *Brown v. Felson* recognized an implied repeal of § 1738, and that this Court's specific holding regarding the doctrine of collateral estoppel in *Grogan* should be ignored, was made by a Bankruptcy Court for the Northern District of Alabama in *In re Wald*, 208 B.R. 516 (Bankr. N.D. Ala. 1997), a case heavily relied upon by Litwak. It should be noted, however, that the only question before *Wald* court was whether to give collateral estoppel effect to an Alabama default judgment. The *Wald* court applied Alabama law and found that, as with federal default judgments, Alabama default judgments do not have collateral estoppel effect. *Id.* at 531. The rest of the decision, which advocates for universal application of the federal rule, is mere dicta.

The guarantor filed a cross-claim against the debtor, alleging that the dealer had induced the guarantor to sign the guaranty with certain misrepresentations. The parties settled the suit by stipulation which provided that the lender could recover jointly and severally against both the dealer and the guarantor, and that the guarantor should have judgment against the dealer. *Brown*, 442 U.S. at 128. The stipulated judgment was not, however, for fraud. *Id.*

The dealer subsequently filed for bankruptcy, seeking to have his debt to the guarantor discharged. The guarantor filed a complaint to determine the debt nondischargeable under § 523 (formerly § 17), and the dealer/debtor moved for summary judgment claiming that the doctrine of *res judicata* barred relitigation of the nature of the debt. In holding that *res judicata* does not always apply in bankruptcy dischargeability proceedings, this Court found that "[r]efusing to apply *res judicata* here would permit the bankruptcy court to make an accurate determination whether respondent in fact committed the deceit, fraud, and malicious conversion which petitioner alleges. These questions are now, for the first time, squarely in issue." *Id.* at 138.

The *Brown* court distinguished between using a judgment to support the validity of an underlying debt and attempting to use that same judgment "to meet . . . the new defense of bankruptcy which [the debtor] has interposed between [the creditor] and the sum determined to be due him." *Id.* at 133. Indeed, *Brown* specifically stated that, "If, in the course of adjudicating a state-law question, a state court should determine factual issues using standards identical to those of [§ 523], then collateral estoppel, in the absence of countervailing statutory policy, would bar relitigation of those issues in the bankruptcy court."

Brown, supra, 442 U.S. at 139 n.10. Of course, this Court subsequently amplified this point in *Grogan* where it unequivocally stated, "we now clarify that collateral estoppel principles do indeed apply in discharge exception proceedings pursuant to § 523(a)." *Grogan*, 498 U.S. at 139. Therefore, *Brown* does not compel federal courts to ignore § 1738; to the contrary, this Court's subsequent decision in *Grogan* mandates the opposite result.[8]

II. There Is No Constitutional Requirement That Federal Collateral Estoppel Principles Be Applied To State Default Judgments In Bankruptcy Proceedings.

Litwak insists that application of state collateral estoppel principles in the default context conflicts with Congress' constitutional power to establish "uniform laws on the subject of bankruptcies." *See* Constitution, Art. 1, § 8, cl. 4. However, this Court has already clearly held in *Grogan* that collateral estoppel effect must be given to state judgments in nondischargeability proceedings. Obviously, then, the *Grogan* court did not believe that application of collateral estoppel conflicted with the uniformity requirement. This is not surprising, since, as this Court has repeatedly held — including in the very cases relied upon by Litwak — the uniformity requirement does not mandate an abandonment of state law principles.

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8. Of course, if Congress disagreed with this reading of *Grogan*, it could expressly repeal § 1738 with respect to the application of default judgments to nondischargeability proceedings. Indeed, a proposal to this effect was included in the Consumer Lender and Borrowers Bankruptcy Accountability Act of 1998, but the bill was not enacted. H.R. 3146 § 14(f), 105th Cong., 2d Sess. (1997). While bankruptcy reform legislation of various stripes has been introduced in the current session of Congress, the provision regarding default judgments has not been re-introduced.

Indeed, this point was very recently reiterated by this Court in *Raleigh v. Illinois Department of Revenue*:

> The "basic federal rule" in bankruptcy is that state law governs the substance of claims, [*Butner v. United States*, 440 U.S. 48, 57, 99 S. Ct. 914 (1979)], Congress having "generally left the determination of property rights in the assets of a bankrupt's estate to state law," [*Butner*, 440 U.S. at 54]. "Unless some federal interest requires a different result, there is no reason why [the state] interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." 440 U.S. at 55.

__ U.S. __, 120 S. Ct. 1951, 1955 (2000).

This Court also discussed the uniformity requirement in *Railway Labor Executives' Assn. v. Gibbons, Trustee, et al.*:

> The uniformity requirement is not a straitjacket that forbids Congress to distinguish among classes of debtors, nor does it prohibit Congress from recognizing that state laws do not treat commercial transactions in a uniform manner. A bankruptcy law may be uniform yet "may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States."

455 U.S. 457, 469, 102 S. Ct. 1169 (1982), citing *Stellwagen v. Clum*, 245 U.S. 605, 613, 38 S. Ct. 215 (1918) and *Hanover National Bank v. Moyses*, 186 U.S. 181, 22 S. Ct. 857 (1902).

Thus, as this Court has held time and time again, Litwak's concern that determinations as to the effect of default judgments may differ from state to state does not run afoul of the uniformity requirement.[9] Rather, giving full faith and credit to state default judgments in accordance with § 1738 is entirely consistent with "the basic federal rule" referenced in *Raleigh* as well as the holding of *Grogan*.

III. The Peculiar Facts Of This Case Make It A Poor Choice For Examination Of The Issues Presented.

In the unlikely event that the Court believes that Litwak's Petition presents a legal issue meriting review, it should still deny certiorari here, because the unusual facts of this case make it a poor one for consideration of the issues presented. Litwak was no "innocent" defaulter, who had no idea of the consequences of failing to defend the complaint against him. Litwak knew that a lawsuit had been filed against him and *that his default had been entered*, even appearing for his deposition to testify in the case after this had occurred. (Excerpts of Record, Ex. 6, p. 0163, below). He had his opportunity to have his day in court. He chose not to exercise that right, never moving to set aside the default; nor did he file for bankruptcy at that time, presumably because he assumed that he could always do so at a later date and further delay the consequences of his admitted "improper and wrongful" conduct. (Supplemental Excerpts of Record, Ex. 20, p. 0368, below). Litwak nonetheless now seeks a second chance to litigate the factual issues in the state court action.

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9. Litwak's concern that a given state's law on the effect of default judgments may itself be unclear does not pose a new problem for federal courts, which must determine how a state's highest court would decide state law questions any time the *Erie* doctrine applies. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

As stated in *Grogan*, and very recently reaffirmed by this Court, "the Bankruptcy Code has long prohibited debtors from discharging liabilities incurred on account of their fraud, embodying a basic policy animating the Code of affording relief only to an 'honest but unfortunate debtor.' " *Cohen v. Hilda de la Cruz*, 523 U.S. 213, 217, 118 S. Ct. 1212 (1998). Litwak's actions, however, were not those of an honest or unfortunate debtor. This case is therefore not an appropriate one for high court review.

CONCLUSION

For all the foregoing reasons, Litwak's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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